Should It Take a Thief?: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases

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"*Justice must manifestly be seen to be done.*"[1]

I. INTRODUCTION

Traditionally, courts have admitted evidence in civil cases without regard for the manner by which it was obtained by the proponent.[2] Neither unlawful acts nor invasions of privacy have been considerations in judicial determinations of admission into evidence. Only in certain limited areas have legislatures acted to protect individual privacy through prohibition against the interception[3] and introduction into evidence of electronic communications.[4] Nevertheless, a body of law or, perhaps more aptly stated, bodies of laws, have developed in criminal cases excluding evidence because of the manner in which it is obtained. Most notable is what is generically known as the "exclusionary rule." It enforces the Fourth Amendment's guarantee of "[t]he right of the people to be secure . . . against unreasonable searches and seizures"[5] by excluding from admission into evidence in federal and state criminal prosecutions that which is obtained in violation thereof by unlawful governmental action.[6]

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1. HENRY CECIL, INDEPENDENT WITNESS 63 (1963) (quoting an explanation given by defendant's attorney as to why an exceptionally hard-nosed judge would recuse himself as a result of an "accidental" encounter with and accompanying insult by the defendant and his companion on the eve of trial).

2. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 7 (McNaughton rev. 1961).

3. *See, e.g.*, 18 U.S.C. § 2511 (2000) (making it unlawful to intercept an electronic communication by means of a "device"). Many states have comparable provisions.

4. *See, e.g.*, 18 U.S.C. § 2515 (2000) (providing that "no part" of any unlawfully intercepted communication "may be received into evidence in any trial, hearing or other proceeding").

5. U.S. CONST. amend. IV. The Fourth Amendment in its entirety reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

6. *See* Mapp v. Ohio, 367 U.S. 643, 656-57 (1961) (extending the exclusionary rule to state criminal prosecutions in which unconstitutionally obtained evidence is

Although the exclusionary rule based on Fourth Amendment protection is perhaps the most commonly known, courts also exclude relevant evidence based on other constitutional protections, such as confessions given involuntarily[7] and statements made when a proper Miranda warning has not been given.[8] However, these exclusionary rules are limited to governmental actors and therefore are not considered applicable to civil actions[9] nor to criminal prosecutions in which the offered evidence has been unlawfully obtained by a private person.[10]

The judicially developed exclusionary rule initially had two separate goals. One was to enforce the Fourth Amendment through deterrence of illegal governmental action.[11] The other was to preserve judicial integrity by not allowing illegally obtained evidence as an exercise of the supervisory powers of the Supreme Court.[12] As the Court considered issues such as whether the exclusionary rule was applicable to state prosecutions, the basis of and rationale for the exclusionary rule became increasingly important. A rule based upon

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sought to be admitted, thereby reversing Wolf v. Colorado, 338 U.S. 25, 27 (1949), which had found the Fourth Amendment's exclusion of improperly obtained evidence was not applicable to the states); Weeks v. United States, 232 U.S. 383, 398 (1914) (relying solely on the Fourth Amendment in holding in a criminal prosecution that exclusion is an appropriate sanction for seizure of private documents by federal agents in violation of the Fourth Amendment); Boyd v. United States, 116 U.S. 616, 634-35 (1886) (holding the compelled production of private papers sought to be used in evidence in a forfeiture proceeding to be violative of the Fourth Amendment's prohibition against unreasonable searches and the Fifth Amendment's prohibition against self-incrimination).

7. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 752 (1966) (excluding confessions from evidence because the "confessions were the involuntary end product of coercive influences").

8. Miranda v. Arizona, 384 U.S. 436, 490 (1966). For a recent application of *Miranda*, see *Dickerson v. United States*, 530 U.S. 428, 432-33 (2000).

9. 8 WIGMORE, *supra* note 2, § 2183, at 1060 (2002-2 Supplement). The civil/criminal distinction is overly simplified and does not adequately answer all questions of applicability. For example, actions that are civil in form but have a quasi-criminal element to them, such as forfeiture actions, have been held subject to the exclusionary rule. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697 (1965).

10. *See generally* Burdeau v. McDowell, 256 U.S. 465, 467 (1921) (holding, prior to *Mapp*, that no Fourth Amendment violation had occurred where government actors had not participated in the unlawful seizure of evidence by private actors).

11. *See infra* text accompanying notes 124, 127.

12. *See* discussion *infra* Parts V, VI.

supervisory powers would have no application upon the states, while a rule based on the Fourth Amendment would be applicable to the states by way of the Fourteenth Amendment.[13] Consequently, deterrence based on the Fourth Amendment became settled upon as the basis for the "exclusionary rule," thereby allowing enforcement upon the states.[14] As a result, the importance of exclusion as a means to preserve judicial integrity faded.

At the same time that the exclusionary rule applicable to criminal prosecutions was developing, courts hearing civil cases also were considering whether illegally obtained evidence should be excluded. The majority of courts rejected exclusion in favor of the traditional rule of admitting evidence without consideration of its source.[15] A handful, however, did find that the illegality of the proponent's actions warranted exclusion, but the legal bases for such rulings were often ill-defined or not well articulated.[16] While the exclusionary rule based on the Fourth Amendment was held inapplicable to civil cases involving unlawful actions of private parties,[17] exclusion for purposes of preserving judicial integrity was lost in the shuffle and not fully considered.[18] Therefore, it continues to be the position of courts hearing civil actions to allow the admission of evidence that has been illegally obtained by the proponent.[19]

This Article reexamines the matter from its inception, largely in the context of adultery-based divorce actions, to the present day widespread application. It argues that two changes in litigation and society warrant reexamination of the doctrine. The first is that the present broad scope of civil discovery obviates the need to resort to illegally obtained evidence to aid the search for the truth. The second is a change in how society views the equities of certain situations in which illegally obtained evidence would be offered. While it was once viewed that the illegally obtained evidence was necessary to expose the wrongdoings of a party, a less stringent societal moral code combined with an increased sense of personal privacy now outweighs the perceived necessity to resort to illegally obtained evidence in order to

13. *See* Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

14. *See* People v. Owens, 623 N.Y.S.2d 719, 722 (Sup. Ct. 1995) (holding that unconstitutionally obtained evidence is inadmissible in state courts after *Mapp*).

15. *See* discussion *infra* Parts IV, IX.

16. *See infra* notes 88-91, 109-14, 160-67 and accompanying text.

17. *See infra* Parts VIII, IX.

18. *See infra* notes 166-67 and accompanying text.

19. 8 WIGMORE, *supra* note 2, § 2183, at 7.

expose the perceived wrong. Therefore, if there is some cost to the integrity of the legal system by admitting unlawfully obtained evidence, this Article argues that it is not necessary for the system to bear that cost when that which has been obtained illegally is available by other lawful means.

II. SEARCHING FOR THE TRUTH IN CIVIL CASES WITH "EVERY MAN'S EVIDENCE"

A. The Traditional Doctrine

"*The incidental illegality [in how the evidence was obtained] is by no means condoned. It is merely ignored in* this *litigation.*"[20]

Though admitting into evidence that which has come into the possession of the proponent through unlawful action, especially his or her own, raises issues as to the propriety of so doing, courts have not languished over these questions and have traditionally admitted evidence without regard as to how it was obtained.[21] Some courts have expressed concerns over allowing a litigant to gain advantage from an unlawful act, as well as a concern over whether the integrity of the court is compromised by admitting ill-gotten evidence.[22] Nevertheless, those concerns have been trumped by a perceived need to admit all relevant evidence as an aid in the search for the truth.[23] Additional rationales for

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20. 8 WIGMORE, *supra* note 2, § 2183, at 7.

21. 8 WIGMORE, *supra* note 2, § 2183, at 7 (stating that, traditionally, the illegality of the manner in which evidence was obtained was ignored); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 137, at 291 (1954) (noting that, until after the beginning of the twentieth century, the illegality of the means by which evidence was procured was no grounds for objection to its admission).

22. *See* Sackler v. Sackler, 229 N.Y.S.2d 61, 65 (App. Div. 1962) (Christ, J., dissenting) ("It is a strange concept which would permit a court of law to encourage the commission of illegal acts by honoring the fruits of the illegality, and which would permit the perpetrator to win a lawsuit by deliberately violating the law."), *aff'd*, 203 N.E.2d 481 (N.Y. 1964).

23. *See* Rattray v. Rattray, 25 R. 315 (Sess. 1897) (Lord Traynor). In *Rattray* Lord Traynor stated:

> Nor am I moved by the consideration, urged by the defender, that by

admitting illegally obtained evidence include a desire of courts to avoid collateral litigation on how evidence was obtained[24] and findings by courts that exclusion is unnecessary because of other remedies available to the wronged party.[25] However, the predominant notion has been that all evidence, or "every man's evidence," no matter how it is obtained, should be considered as part of the court's truth-finding function.[26]

B. Any Reason for Reexamination?

Ascertaining the truth as part of the resolution of a dispute is a lofty, if not seductive, goal with which it is difficult to find fault. Nevertheless, two factors speak to a reexamination of the traditional rule. The first is that civil litigation is not as much a search for the truth as it is a means of reaching an acceptable resolution of a dispute. The second is that the public perception of the integrity of the judicial system is compromised by the acceptance of evidence obtained by unlawful means.

Regarding the first factor, in many ways it seems inaccurate to

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> admitting this letter as evidence I am acting contrary to good policy and giving an encouragement to crime. The policy of the law in later years (and I think a good policy) has been to admit almost all evidence which will throw light on disputed facts and enable justice to be done; and as to encouragement of crime, it is not much encouragement to a man to possess himself unlawfully of a letter, if while being told that he may use the letter in evidence, he is also told that he must go to prison for that which he has done to get possession of it.

Id. at 318-19; *see also* Stevison v. Earnest, 80 Ill. 513, 518 (1875) ("[W]hy shall a record, although illegally taken from its proper place of custody and brought before the Court, but otherwise free from suspicion, be held incompetent?").

24. *See* Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841) ("When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question.").

25. *See* Williams v. State, 28 S.E. 624, 627 (Ga. 1897) ("[T]he most that any branch of government can do [when evidence has been unlawfully obtained] is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct.").

26. *See* United States v. Bryan, 339 U.S. 323, 331 (1950) ("'For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence.'") (quoting JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 64 (3d ed. 1940)).

view civil litigation as a search for the truth. Instead, the litigation process is a curious blend of adversarial sparring and compromise with a goal geared more toward achieving a resolution of a dispute that is acceptable to both the parties involved and to society as a whole than toward ascertaining the truth. Both pleading and discovery involve an adversarial process that does not pretend to actually discern the truth. Notice pleading requires only a simple statement that does not have to contain factual truths,[27] but may not contain untruths.[28] Compelled discovery requires only the answers to questions asked, not an explanation of the whole truth.[29] The recent additions to the discovery process of initial disclosures could be viewed as an attempt to aid the truth-seeking function of civil litigation.[30] However, the required disclosures include only specified categories of information a party "may use to support its claims and defenses."[31] Disclosure of adverse information, even if it speaks to the truth, is not required. Yet amid this adversarial dance, the pretrial process also seeks to involve the parties in various procedures aimed at achieving a compromise settlement, such as mediation and settlement conference.[32] The intention of such procedures is to resolve the dispute rather than necessarily to expose the

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27. *See* FED. R. CIV. P. 8(a)(2) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief"); Conley v. Gibson, 355 U.S. 41, 47 (1957) ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. . . . The illustrative forms appended to the Rules plainly demonstrate this.").

28. *See* FED. R. CIV. P. 11(b)(3), (4) (requiring that allegations in written documents have "evidentiary support" and that "denials of factual contentions are warranted on the evidence").

29. *See* FED. R. CIV. P. 37(a)(2)(B) (providing sanction for failure to answer a question propounded, but not for failure to state the whole truth unless specifically requested by the right question having been asked).

30. *See* FED. R. CIV. P. 26(a)(1) (requiring initial disclosures by adversaries without the necessity of a discovery request from an opposing party). The initial disclosures provision was added in 1993 and amended in 2000.

31. *See* FED. R. CIV. P. 26(a)(1)(A), (B) (requiring initial disclosure of individuals "likely to have discoverable information" and "documents, data compilations, and tangible things" that a party "may use to support its claims or defenses").

32. *See* FED. R. CIV. P. 16(c)(9) (making "settlement and the use of special procedures to assist in resolving the dispute" areas in which "the court may take appropriate action" during pre-trial conference).

truth.[33]

The process of civil litigation appears to be more aimed toward attaining a resolution than ascertaining the truth. Otherwise, how is it that we ask juries to reach conclusions by a preponderance of the evidence? We do not ask them to arrive at the truth. We ask juries to determine what they think was more likely to have happened. Of course, the truth—in all its unwashed or illegally obtained form—would certainly aid that determination. But is it a goal of litigation that trumps all other concerns? Or, do other goals, such as not rewarding or countenancing illegal behavior, outweigh the need to consider "every man's evidence"?[34] We deny juries access to other evidence in order to foster social policies, such as protecting professional relationships by means of evidentiary privilege[35] or encouraging responsible behavior by excluding evidence of subsequent remedial measures.[36] If civil litigation is viewed as a search for truth, then it would seem to follow that all evidence should be allowed if it aids in that determination. Even so, however, the truth-seeking function does not trump the societal goals we seek to foster through the concepts of privileges and exclusionary rules of evidence. Therefore, if the purpose of civil litigation is to provide resolution of a dispute in a manner that is deemed acceptable to both society and the parties, then evidentiary exclusions and privileges have an even more justifiable role.

The dilemma posed by illegally obtained evidence is quite similar to that of privileges and exclusions. If there is a cost to the integrity of the judicial system by accepting illegally obtained evidence, we must consider whether that cost is justified. Excluding the evidence may hinder ascertaining the truth, but so do rules of exclusion and privilege. Because they serve desirable societal goals, whatever hindrance they cause to truth-seeking is justified. When litigation is viewed more as an acceptable dispute resolution than as a truth-seeking endeavor, that justification is even more acceptable. However, that is

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33. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (questioning the settlements produced by pre-trial procedures).

34. *See* United States v. Bryan, 339 U.S. 323, 331 (1950) (discussing exemptions from testifying before a tribunal and commenting that "every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for the truth").

35. *See, e.g.*, FED. R. EVID. 501 (providing that the privilege of a witness shall be governed by common law, such as attorney-client privilege and physician-patient privilege).

36. *See* FED. R. EVID. 407.

really only the case if one accepts that there is a compromise to judicial integrity in considering illegally obtained evidence.

The second factor discusses whether there is a cost to the public judicial system when a disputant benefits from its illegal act by introducing evidence to support its case that has been unlawfully obtained. I believe that there is. As this Article discusses, the waning of the judicial integrity rationale as one of the bases for the exclusionary rule occurred as a matter of judicial expediency in order to enforce Fourth Amendment guarantees in the states via the Fourteenth Amendment.[37] Nevertheless, the concern for judicial integrity was never disputed nor abandoned.[38] Therefore, if one accepts that there is a cost to the integrity of the judicial system as a result of the admission of illegally obtained evidence, one must consider whether that cost is actually necessary as a means to the truth. In a system of civil procedure with an extremely broad scope of discovery, the compromise to the judicial system is not necessary in order to arrive at the truth. As this Article discusses, the "smoking gun" memo should be revealed in response to a request to produce; theft of the document should not be necessary.[39] The adulterous activity should be exposed during a deposition and not in a photograph taken by breaking and entering.[40] When we allow illegally obtained evidence, we are assuming it is necessary because the party against whom it is offered will be evasive or dishonest in discovery. We condone an illegal act in order to counter the possibility of a dishonest act. At the risk of being trite, the question in the world of litigation becomes this: do two wrongs make a right?[41]

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37. *See infra* notes 117-28 and accompanying text.

38. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."). *But see* JOHN W. STRONG, MCCORMICK ON EVIDENCE § 165, at 246 (5th ed. 1999) (arguing that Brandeis's view that the integrity of courts is compromised by admitting illegally obtained evidence "may simply be inconsistent with reality").

39. *See infra* notes 49-50, 173-78 and accompanying text.

40. *See* discussion *infra* Part III.C.

41. In constructing a system of public dispute resolution, it is an interesting dilemma to consider what should be presumed about the litigants. Should legal principles be constructed upon the assumption that no one can be trusted? If so, a counterbalancing of two wrongs may indeed make a right. Or do we proceed from the assumption that parties availing themselves of the system will play by the rules, and that if they do not, the applicable mechanisms of enforcement are adequate to address

This point hinges on the perceived equities involved in the individual case. In some situations, our view of the defendant as a bad actor justifies the breach of the law in order to expose the wrong that might otherwise never be revealed. However, when our perception of the equities involved changes, so does our view of whether the illegal act is justified. In other situations, the illegal evidence may be offered against a sympathetic person. The wrong that is exposed with the illegal evidence may be perceived by society to be relatively benign and, therefore, not a justification for countenancing an illegal act in order to reveal the truth. As will be discussed, the traditional rule of admitting illegally obtained evidence developed in the context of adultery at a time when the equities involved justified allowing the evidence to expose a wrongdoing. However, changing times change society's view of the equities involved. Consequently, setting the reexamination into several contexts may help further the discussion.

III. CONTEXTS FOR DISCUSSION

For purposes of considering the continued propriety of admitting illegally obtained evidence, I have selected three scenarios as contexts for analysis. In choosing them, I have striven to select simple,[42] yet realistic, situations that admittedly may blur state and federal actions. Because my simple premise is that there is an unnecessary cost to the public system of civil justice in admitting illegally obtained evidence, I believe that premise holds equally true in both state and federal court. Therefore, my examples and discussion will consider the two interchangeably. These examples are by no means exhaustive, but I believe they adequately frame the main issues for discussion: (1) whether the resultant action could be filed without the evidence; (2) whether the evidence advances a presently filed case; (3) whether the evidence would be available by legitimate means, such as through discovery or mandatory pretrial disclosure; and (4) how society views the propriety of allowing this evidence in a public resolution of a dispute.

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the transgression? These questions are directly related to the one posed above as to the purpose of a trial. It presumes both the worst about the parties involved to allow whatever is necessary to get to the truth, as well as the ineffectiveness of the discovery process in dealing with tellers of non-truth.

42. Perhaps overly simplistic is more accurate.

A. Illegally Obtained Evidence Necessary To File the Action: No Crime, No Case

The first setting is one that any of us teaching at a law school has most likely encountered each year. A student has rented an apartment pursuant to a lease agreement that provides that the tenant shall not have a pet, waterbed, unauthorized roommate, or the like. The lease also provides that the landlord shall enter the apartment only for necessary repairs and upon notice provided in advance at a specified term, such as twenty-four or forty-eight hours. The tenant violates one of the prohibitions. The landlord enters without the required advance notice and not for an authorized purpose. While in the apartment in violation of the lease, as well as of applicable trespass laws, the landlord encounters the offending pet, waterbed, or roommate. An eviction action follows.[43]

The availability of the illegally obtained evidence is of the greatest possible significance to the case. Without the unlawful entry into the apartment, there would most likely be no basis to maintain the action, for the sole evidence of the breach of the lease is obtained through the landlord's unlawful entry.[44] Because the illegally obtained evidence is required to commence the action, there would be no discovery by which the evidence could be obtained.[45] If the action had been possible without evidence obtained from the trespass, the violation would be disclosed in a truthful response to a simple discovery request

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43. *Cf.* Boston Housing Auth. v. Guirola, 575 N.E.2d 1100, 1106 (Mass. 1991) (acknowledging that a landlord's unauthorized entrance into a tenant's apartment was an illegal act that could give rise to questions of whether evidence gathered during the entry should be admitted, but finding the landlord's entry was not unlawful).

44. Of course it is possible that a person lawfully on the premises could inform the landlord of the conduct constituting the breach of the lease, but it seems unlikely that a person invited into the apartment by the tenant would then be a witness against the tenant.

45. Although FED. R. CIV. P. 11(b)(3) and many comparable state provisions do provide for the filing of actions in which the factual allegations "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," it would be unlikely that the landlord could meet the threshold of "likely to have evidentiary support" without the unlawful entry into the apartment.

I do not mean to imply that eviction actions are regularly maintained in federal court. I am using the Federal Rules as an example.

or examination of the tenant at trial. However, if the tenant/litigant were willing to give an untruthful and most likely perjurious response, then the pet, waterbed, or unauthorized roommate could be removed or hidden. Consequently, the search for the truth would have been subverted. This raises the question: should the judicial system countenance one illegal act in order to expose another?

According to society's view of the equities involved, both landlord and tenant are wrongdoers. However, we do not view their actions equally. The tenant has engaged in activity that, if it causes any damages to the landlord at all, can be compensated financially. For example, if a pet soils the carpet or if the waterbed leaks, the damage is apparent upon move-out. Most likely, a security deposit provides a readily available fund to compensate the landlord. If it is insufficient, the landlord can seek redress.[46] On the other hand, the wrong to the tenant is an invasion of privacy, and the intangible nature of this wrong makes financial compensation difficult, if not impossible, to measure. Although the basic reasoning that two wrongs do not make a right is a dangerously slippery slope, society would not seem to countenance an invasion into a home, even to expose a wrongdoer or to advance the search for the truth, when the truth is the existence of an unauthorized pet or waterbed.

Because the tenant's wrong is minor, the need to expose the illegal pet, waterbed, or roommate does not seem to justify the privacy invasion that gave rise to the illegally obtained evidence. However, what if the wrong sought to be exposed was not a minor lease violation? Would society countenance the invasion of privacy in order to expose racial or gender discrimination, or the tobacco industry's engineering of cigarettes to make them more addictive, or an effort to cover up a botched surgery? In those situations, the proprieties of allowing evidence obtained by unlawful means substantially change. Nonetheless, I have a difficult time imagining a situation in which the wrong sought to be exposed is significant, but the existence of the wrong is only known because of the illegal act. The landlord would most likely not know of the pet or waterbed but for the unlawful entry. Therefore, the action could not be maintained without it. However, the unfairly treated employee, cancer-stricken smoker, or injured patient would already be familiar enough with their respective injuries to

46. *See, e.g.*, Duerne v. Alcime, 448 So. 2d 1208, 1210 (Fla. Dist. Ct. App. 1984) (discussing generally that a landlord may bring a claim for damages).

maintain an action within the constraints of Rule 11.[47] By maintaining the action, the plaintiff has the opportunity to obtain through discovery that which he or she may be tempted to obtain unlawfully.

B. Illegally Obtained Evidence Necessary To Prove a Case, Part I: The Crime Happily Advances a Pending Case

In the second situation, a case is pending, such as a race or gender employment discrimination suit or a toxic tort action. The plaintiff has been able to plead an adverse effect that he has allegedly suffered because of the defendant's actions and therefore has a basis for filing the case that meets obligations imposed by Rule 11 or a state counterpart.[48] Nevertheless, meeting the burden of proof at trial on the issue of causation will be extremely difficult. While the case is pending, a disgruntled employee of the defendant provides the plaintiff with a purloined "smoking gun" document that provides the proof plaintiff needs.[49] Though the document should have been turned over in discovery, it was not. It is only through the theft of defendant's property that the actions of defendant giving rise to liability are revealed. Because of the underlying nature of the action and the unscrupulous tactics of the defendant, both in committing the underlying wrong and in not disclosing the document in response to a discovery request, society cheers the admission of the illegally obtained document as it advances the search for the truth. Basic "two wrongs do not make a right" reasoning is stood on its head. Society countenances plaintiff's offering evidence obtained by illegal means because of both

47. *See* FED. R. CIV. P. 11(b)(3) (allowing a party to plead facts that do not have evidentiary support without fear of sanction if such facts are "specifically so identified" and "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery").

48. *Id.*

49. One might wish to call this the *Erin Brockovich, A Civil Action*, etc. situation. *Compare* Mingo v. Roadway Express, Inc., 135 F. Supp. 2d 884, 891-92 (N.D. Ill. 2001) (excluding from evidence, in an employment sexual harassment case, a tape recording that the plaintiff made during her exit interview without the knowledge or consent of the participants to the conversation pursuant to applicable state eavesdropping statute), *with* Knoll Assoc., Inc. v. Dixon, 232 F. Supp. 283, 286 (S.D.N.Y. 1964) (allowing documents into evidence obtained through thievery by former employee against former employer).

the nature of the wrong exposed and the fact that defendant has committed a second wrong by subverting the discovery process. In a sense, defendant has committed two wrongs that can be viewed as outweighing plaintiff's one wrong.

This situation is also unique in that the plaintiff, the party benefiting in the litigation from the illegal action of the disgruntled employee, did not necessarily participate in the illegal action.[50] Therefore, allowing this evidence does not necessarily reward a party for its own wrongdoing. Of course, in a strict sense the party knowingly possesses stolen material, and a highly moral sensibility might lead one to believe that the purloined document should be returned to the rightful owner. However, because the rightful owner is a wrongdoer, society does not expect such to happen. Even if the injured plaintiff or her attorney participated in theft of the document, society's view still does not change significantly. The exposure of the wrongdoer remains adequate justification for the illegal act required to bring it into the light of day, though such does not extend to all wrongdoers. The societal repugnance of the quasi-public wrong overshadows the unlawfulness of the action required to expose and prove it. However, as was seen in the first scenario, when the exposed wrong is perceived by society to be of a lesser degree of turpitude and strictly between the litigants, a point is reached where the wrong involved in obtaining the evidence is no longer outweighed by the wrong that is exposed thereby.

C. *Illegally Obtained Evidence Necessary To Prove a Case, Part II: The Crime Unhappily Advances a Pending Case*

In the third situation, a divorce action is pending with adultery as the alleged grounds. One of the parties gains information by unlawful means about the other and seeks to use it to prove adultery. The means range from opening or stealing mail[51] to bursting, camera in

50. *Cf.* United States v. Prod. Plated Plastics, Inc., 129 F. Supp. 2d 1099, 1105-06 (W.D. Mich. 2000) (discussing that when the party offering the evidence is not the party that violated the opponent's privacy rights in its acquistion, the equities involved do not justify the "societal cost" of excluding the evidence).

51. *Cf.* Williams v. Williams, 8 Ohio Misc. 156, 163 (Ct. Com. Pl. 1966) (refusing to consider letters apparently written by the wife to a former fiancé that were taken from her car by her husband during divorce proceedings and apparently upon advice of his attorney).

hand, into a motel room in which the other is engaged in adulterous acts.[52] As will be discussed, it is significant that this situation appears to be the context in which the doctrine of exclusion in civil actions between private parties developed, and it is one of the most frequent contexts in which it has been most often considered.[53] It is also of interest that these cases occurred at a time when adultery was the only available grounds for divorce. Courts were then faced with the choice between countenancing the unlawful act and invasion of privacy or excluding the evidence, leaving the proponent with no avenue to end his marriage to his adulterous spouse.[54]

This scenario is similar to the second situation in that the action could most likely be initially maintained without the illegally obtained evidence, and the underlying adultery would be exposed by a truthful answer to a question posed during a deposition or in an interrogatory. However, unlike the second situation, this scenario reflects a significant change in recent decades in society's view of the equities involved. We do not necessarily cheer the illegally obtained revelation, as we would the exposed polluter or exposed perpetrator of discrimination. In this respect, it more closely resembles the first situation in which the landlord engages in trespass in order to expose or catch the tenant in a relatively minor wrong. While the exposed adulterer is engaged in conduct society does not wish to foster, the conduct is not such that it leads to condemnation of the same magnitude as applied to the discriminating employer or toxic polluter. As this Article discusses, it is through this third situation that the doctrine of admissibility of illegally obtained evidence developed. The development, however, occurred at a time when society's view of adultery was much different and less tolerant. As a result of this shift of viewpoint, society might

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52. *Cf.* Del Presto v. Del Presto, 223 A.2d 217, 217-18 (N.J. Super. Ct. Ch. Div. 1966) (excluding evidence obtained from a raid by wife, her son, police, and private investigator, upon the apartment of husband's lover during which photographs were taken and visual observations were made), *rev'd*, 235 A.2d 240, 247 (N.J. Super. Ct. App. Div. 1967); Sackler v. Sackler, 224 N.Y.S.2d 790, 796 (Sup. Ct. 1962) (excluding evidence including photographs obtained by a husband's forceful entry and raid of his wife's separate apartment in order to obtain evidence of adultery), *rev'd*, 229 N.Y.S.2d 61 (App. Div. 1962), *aff'd*, 203 N.E.2d 481 (N.Y. 1964).

53. *See* discussion *infra* Parts IV, IX.

54. The choice of the male pronoun is purposeful. The reported cases almost uniformly involve a male seeking divorce by proving the adultery of his spouse.

also now abhor the privacy invasion encompassed in obtaining the evidence and restore basic "two wrongs do not make a right" reasoning. This is especially true when truthful answers to discovery should lead to the peaceful and lawful disclosure of what had to be previously obtained by illegal means in order to aid the search for the truth. Of course, if the adulterer is not truthful in response to discovery requests, that additional wrong is added to the equation.

D. Attorney Misconduct: A Separate Issue

These three situations are by no means exhaustive, but they provide a framework within which to examine the question of the admission of illegally obtained evidence. Though it does not involve activity that subjects the actor to civil or criminal liability, evidence obtained by an attorney in violation of applicable rules of professional conduct also deserves mention.[55] For example, an attorney may have engaged in misrepresentation when interviewing a potential witness[56] or communicated directly with a party the attorney knew to be represented.[57] Neither course of conduct is illegal, but both violate professional rules of ethics.[58] The admission of evidence obtained in such manner gives rise to the dilemma of whether courts should participate in or condone improper conduct. When confronted with these situations, courts have not approached them in a consistent manner. Some have found that the ethical violation does not preclude the admission of the improperly obtained evidence.[59] Others have

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55. *See generally* Erica M. Landsberg, *Policing Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. CHI. L. REV. 1399 (1986) (discussing ethical constraints on attorney behavior in gathering evidence and calling for an exclusionary rule as the most effective means to enforce professional obligations).

56. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . . .").

57. *See id.* R. 4.2 (2002) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

58. Of course, it is an ethical violation for a lawyer to obtain evidence by unlawful means. *See id.* R. 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.").

59. *See, e.g.*, Ross v. City of Geneva, 357 N.E.2d 829, 836-37 (Ill. App. Ct.

excluded the evidence based upon the violation of ethical principles.[60] Another approach when improper contacts have occurred in pending litigation is for courts to find a subversion of the discovery process that warrants the exclusion of the evidence, while at the same time expressing concerns for lapses in ethical conduct.[61] The breadth of the topic warrants its own article beyond the scope allowed herein. The Model Rules of Professional Conduct prohibit a lawyer from obtaining evidence by means that "violate the legal rights" of a person;[62] the related issue regarding the professional obligations of the attorney when considering offering into evidence something which has been illegally obtained by someone else is less clearly addressed.

IV. THE TRADITIONAL RULE AT ITS INCEPTION

Judicial discussion of the traditional rule of allowing evidence in civil cases without regard to its source has been less than cursory, especially when compared to that devoted to the exclusionary rule

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1976). The *Geneva* court held:

> While we, like plaintiff, are concerned with the practice of contacting members of the opposing class, which presents the opportunity to misrepresent the nature and effect of the class action and to encourage defection, we have found no Illinois rule or case law which would allow us to exclude such evidence. We therefore decline to exclude this evidence.

Id. (footnote omitted).

60. *See, e.g.*, Cagguila v. Wyeth Labs., Inc., 127 F.R.D. 653, 655 (E.D. Pa. 1989) (excluding evidence obtained when counsel for plaintiff contacted an employee of defendant corporate counsel without notifying defense counsel).

61. *See, e.g.*, Bruske v. Arnold, 254 N.E.2d 453, 457 (Ill. 1969) (excluding a statement made during the pendency of litigation by a represented defendant to a private investigator hired by plaintiff and noting that the importance of ascertaining the truth must sometimes yield to enforcement of the rules of professional conduct and discovery); *see also* Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc., 440 F.2d 1216, 1219 (7th Cir. 1971) (excluding evidence derived from an interview of plaintiff's agent conducted by a private investigator hired by the defendant who failed to notify plaintiff's attorney or to dispel the misconception of the witness that the investigator worked for plaintiff on the basis of improper expert testimony, indicating the "desirability of deterring improper investigative conduct").

62. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 (2002).

based on the Fourth Amendment. When faced with a party seeking to exclude something from admission into evidence because it has been obtained illegally from that party by the opponent, the courts most often simply recite the common law doctrine that evidence is to be admitted without consideration of how it was obtained.[63] Of course, if the rule of law is settled, further exploration is pointless. However, because the concept of personal privacy and the process of civil litigation were still evolving at the time that the exclusionary rule was developing, it would be expected that more discussion of the issue would be appropriate. As this Article discusses, while an exclusionary rule based on the Fourth Amendment could be dismissed as inapplicable to civil actions, an exclusionary rule based upon concerns of judicial integrity and the supervisory powers of the court would not be confined to governmental actors and criminal prosecutions.[64] Nevertheless, the issue has received extremely short shrift and has not been fully addressed by the courts.

The context in which the issue has been raised, in terms of both the nature of the underlying action and society's view of the parties involved, may have contributed to the paucity of judicial reasoning involved. The cases largely involve divorces sought from adulterous spouses.[65] Courts allowed the cuckold to admit into evidence letters stolen from the post office or the addressee, photos or other evidence obtained from unlawful entries, and the like.[66] The reasoning of those courts, however, was neither well argued nor strongly argued. The issues have not been fully addressed. Many of the seminal opinions drew vigorous dissents. The reasoning employed was often little more than a statement that no existing precedent prevents the admission of illegally obtained evidence.[67] At times it was weak, arguing that stealing letters from the post office constituted an offense that the court was "not prepared to call [a] crime,"[68] even though the offense was considered a "high crime and offence" punishable by "transport[ation] beyond the seas for life."[69] Additionally, some courts reasoned that the proper remedy lay in criminal or civil penalties, or both, rather than in the exclusion of the unlawfully obtained evidence, with the search for

63. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 467 (1928).

64. *See* discussion *infra* Parts VIII, IX.

65. *See supra* Part III.C.

66. *See* sources cited *supra* notes 51-52.

67. *See, e.g.*, *Olmstead*, 277 U.S. at 468.

68. Rattray v. Rattray, 35 Scot. L. Rep. 294, 296 (Sess. 1897).

69. *Id.* at 295. Mr. Rattray escaped banishment beyond the seas and was instead sentenced to seven days of imprisonment. *Id.* at 294-95.

the truth trumping the need to sanction the perpetrator of the unlawful act.[70]

The societal and legal setting of the early decisions is instructive as to what may have been behind the shallow reasoning of the courts. These decisions date back to the late 1800s. Divorce was a rarity and was granted in some jurisdictions solely on the grounds of adultery until approximately the last forty years.[71] Sexual relations outside of marriage were considered immoral acts. Sex between a married person and someone other than that person's spouse was condemned. Therefore, in the absence of the broad-based discovery of the present day, courts may have been motivated to admit illegally obtained evidence in order to allow the cuckold the benefit of the only proof available to meet the burden of proving the only grounds available for divorce.[72] The most frequently cited case in the early Anglo-American line of decisions admitting illegally obtained evidence, *Rattray v. Rattray*,[73] involved a determination of whether adultery had been proven.[74] A letter stolen from the post office was the best proof offered.[75] The court allowed its admission, yet found the grounds unproven.[76] Because the cases frequently involved a husband seeking to prove adultery, one could easily imply sexism, allowing the male cuckold the evidentiary benefits of his unlawful act to provide him with the only exit from his marriage.

Therefore, the development of the traditional rule occurred in a setting like that of the second scenario.[77] Suppose that a case is pending against a party who has committed a societal wrong. It was a relatively secret wrong that would most likely not be exposed without

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70. *See supra* notes 21-26 and accompanying text.

71. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204-08 (2d ed. 1985) (discussing the evolution of grounds upon which divorce could be granted).

72. *See* Recent Case, *Husband's Unreasonable Search Bars Admission of Evidence of Wife's Adultery in His Suit for Divorce*, 110 U. PA. L. REV. 1043, 1047 (1962) ("Since [the] law grants divorce only on the basis of adultery, the aggrieved spouse must often face the choice of violating the civil rights act or of retaining an adulterous partner; hence it is not surprising that some divorce-seekers would choose to violate the act.") (footnote omitted).

73. 35 Scot. L. Rep. 294 (1897).

74. *Id.* at 296-97.

75. *Id.* at 297.

76. *Id.*

77. *See supra* Part III.B.

illegally obtained evidence. Without the evidence, the wrong would go unproven, and the aggrieved party would have no redress. The question for the present then becomes, when what was once comparable to the second scenario has transformed itself into the third,[78] do changed times warrant a changed rule? It is my belief that if the evidence could have been obtained through discovery, then it should not be allowed when obtained by unlawful means.

V. THE DEVELOPMENT OF THE EXCLUSIONARY RULE AND ITS EVER-EVOLVING BASIS

The unwillingness of courts to inquire into how evidence was obtained began to abate in the context of unlawful actions by government officials in regard to criminal prosecutions. Concerns for searches and seizures considered unreasonable in light of the Fourth Amendment, as well as for prevention of self-incrimination pursuant to the Fifth Amendment, led the Supreme Court to abandon the common law tradition of admitting evidence without regard for how it was obtained in a quartet of cases decided in a span of thirty-five years.[79] Interestingly, three of the opinions were authored by Justice Day.[80] As previously stated, the exclusionary rule is not the only situation in which evidence is deemed inadmissible because of the way it was obtained,[81] but because the unlawful search aspect is most closely analogous to the unlawful actions of a private party in obtaining evidence, it serves as the best avenue for discussion. A brief examination of its development is instructive as to the source or sources of judicial authority for its creation. It is also instructive because it shows how a balance was struck between the cost of the search for the truth by the exclusion of relevant evidence and the societal goal of curbing governmental actions that threaten personal privacy.

In the context of governmental actors violating constitutional guarantees in criminal prosecutions, the common rule of admitting

78. *See supra* Part III.C.

79. Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (Day, J.); Weeks v. United States, 232 U.S. 383, 398 (1914) (Day, J.); Adams v. New York, 192 U.S. 585, 594 (1904) (Day, J.); Boyd v. United States, 116 U.S. 616, 641 (1886) (Bradley, J.).

80. *See Burdeau*, 256 U.S. at 465; *Weeks*, 232 U.S. at 383; *Adams*, 192 U.S. at 585.

81. *See supra* notes 7-8 and accompanying text.

evidence without consideration for how it was obtained was abandoned by the Supreme Court in 1914 in *Weeks v. United States*.[82] After being charged with using the mails to transport lottery coupons, Mr. Weeks sought the return, prior to trial,[83] of private papers obtained by state officers and federal marshals in two separate warrantless searches.[84] The trial court denied Mr. Weeks's petition as to papers related to the charge against him and additionally denied his later objections at trial based upon the Fourth and Fifth Amendments when the papers were introduced into evidence against him.[85] He was found guilty and appealed the trial court's refusal to return his papers to him and subsequent allowance of their introduction into evidence.[86] The Supreme Court reversed as to the actions of the marshal, finding that the warrantless search violated rights secured by the Fourth and Fifth Amendments.[87] Justice Day's opinion reasoned that exclusion must necessarily follow as the only effective remedy for the unlawful gathering of evidence:

> If letters and private documents can thus be seized and held *and used in evidence against a citizen accused of an offense*, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the

82. 232 U.S. 383, 398 (1914).

83. Justice Day's opinion seems to find it important that the question of return of the illegally obtained evidence was raised prior to trial: "Nor is it [the situation before the Court] the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained...." *Id.* at 392. The Court was concerned with collateral matters subsuming an ongoing trial. *Id.* at 396. As noted, this is one of the rationales for the common law rule of ignoring the source of evidence. *See supra* note 24 and accompanying text; *see also infra* note 191 and accompanying text.

84. *Id.* at 386. The state officers entered Mr. Weeks's home without a warrant by means of a key, the whereabouts of which was revealed to them by a neighbor. *Id.* Having found some papers, which they turned over to the federal marshal, they returned with him—again without a warrant—and were allowed entry by a person presumed to be a boarder. *Id.* Again, papers were seized and removed. *Id.*

85. *Weeks*, 232 U.S. at 388-89.

86. *Id.* at 389.

87. *Id.* at 393.

Constitution.[88]

While the reasoning of the Court seems unequivocal that exclusion is the only effective means of enforcing Fourth Amendment guarantees, the underlying basis could have been more fully explained, especially in light of the opinion's rejection of a long-standing common law rule. It would have been instructive for the Court to address the rationales of the common law rule it was rejecting, such as the desire to avoid collateral litigation, the availability of other remedies, and the need of the search for the truth of all available evidence.[89] The opinion merely concludes that exclusion is the only effective remedy, without explanation about why a suit for damages against the offending officials would not be adequate.[90] It brushes aside the concern for collateral litigation by stating that the pre-trial context of Mr. Weeks's original petition makes it not a concern in the instant context.[91] Little more is stated.

In deciding *Weeks*, the Court had to address two prior decisions that pointed in opposite directions regarding whether the manner in which evidence had been obtained should affect its admission into evidence. Twenty-eight years prior, in *Boyd v. United States*,[92] the Court had addressed a federal statute that required a claimant in a forfeiture case to produce documents that were then used by the district attorney, over objection, against the claimant who had been compelled to produce them.[93] The Court found the statute unconstitutional as violative of both the Fifth Amendment guarantee against self-incrimination and the Fourth Amendment guarantee of freedom against unreasonable searches and seizures.[94] Although *Boyd* did not involve a search or seizure, thus lending it to criticism for its reliance upon the Fourth Amendment as a "fallacious conclusion" because the case could have been decided "on simple Fifth Amendment grounds,"[95] the

88. *Id.* (emphasis added).

89. *See supra* notes 23-26 and accompanying text.

90. *Weeks*, 232 U.S. at 393.

91. *Id.* at 395-96.

92. 116 U.S. 616 (1886).

93. *Id.* at 619-20.

94. *Id.* at 621-38 (containing a lengthy discussion of how the Fourth and Fifth Amendments are intertwined, as well as the importance of the protection against unreasonable searches and seizures in both England and the United States).

95. *See, e.g.*, 8 WIGMORE, *supra* note 2, § 2184a, at 32; *see also Boyd*, 116 U.S. at 638-41 (Miller, J., dissenting) (agreeing with the holding as to the Fifth

opinion's Fourth Amendment discussion is most frequently cited as giving birth to the concept of exclusion of evidence that was illegally obtained by the government.[96] In *Weeks*, the Court relied upon and extended the reasoning of *Boyd*, holding that exclusion is the only way to effectuate protection against unreasonable searches and seizures.[97]

While *Boyd* apparently set the stage for the exclusionary rule, *Adams v. New York*,[98] decided ten years and one day prior to *Weeks* and, interestingly, also authored by Justice Day, seemed to rein in *Boyd* and stop the movement toward exclusion. In *Adams*, the Court considered the admissibility of documents taken during a search pursuant to warrant but not within the parameters of the authorized search.[99] In affirming the rejection of defendant's objection at trial to the admission of the illegally obtained papers, the Court repeated the common law mantra that "the courts do not stop to inquire as to the means by which the evidence was obtained."[100] The Court's prior decision in *Boyd* had to be addressed. Justice Day, without directly overruling *Boyd*, favorably mentioned Justice Miller's dissent, which had criticized the Fourth Amendment holding, and went on to state that "nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent."[101] Ten years later, Justice Day, writing for a unanimous Court in *Weeks*, did an about-face and repeatedly cited *Boyd* with approval, holding that evidence obtained in violation of the Fourth Amendment should be excluded.[102] *Adams* was unpersuasively distinguished on the basis that the objection to the illegally obtained evidence was made at trial, while in *Weeks* it was made before trial, thereby not requiring the trial court to consider a collateral matter.[103]

Amendment, but disagreeing with the majority holding that the Fourth Amendment analysis is necessary or appropriate because there was neither a search nor a seizure).

96. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 390-91 (1914).

97. *Id.* at 393 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . might as well be stricken from the Constitution.").

98. 192 U.S. 585 (1904).

99. *Id.* at 598-99.

100. *Id.* at 594.

101. *Id.* at 598.

102. Weeks v. United States, 232 U.S. 383, 397 (1914).

103. *Id.* at 396.

The doctrine of exclusion was not off to the most illustrious of beginnings.

Seven years later, Justice Day would write the majority opinion in *Burdeau v. McDowell*,[104] defining and limiting the extent of the new rule of Fourth Amendment exclusion. Mr. McDowell had sought the return of documents in possession of Mr. Burdeau, a special assistant attorney general, who intended to use them as evidence in the prosecution of Mr. McDowell.[105] The documents had been stolen by unknown parties.[106] The Court, with Justice Day again writing for the majority, rejected Mr. McDowell's Fourth Amendment claim, holding it inapplicable due to the lack of any governmental action in the wrongful taking of the papers.[107] Justice Brandeis wrote a brief dissent with which Justice Holmes concurred, arguing that although there may not have been a violation of constitutional prohibitions, governmental actions and the pursuit of justice should not countenance unlawful action.[108]

Thus, the common rule that courts do not inquire into the means by which offered evidence was obtained now held an exception for evidence unlawfully seized by government actors. What remained unclear, however, was whether the rule of exclusion was based upon Constitutional mandate or had a non-constitutional basis, such as the supervisory power over the lower federal courts. Some language of the opinion indicates that the rule found its basis in enforcement of constitutional guarantees:

> The tendency of those who execute criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people

104. 256 U.S. 465 (1921).

105. *Id.* at 470.

106. *Id.* at 470-71.

107. *Id.* at 475.

108. *Id.* at 477 (Brandeis, J., dissenting) ("Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.").

> of all conditions have a right to appeal for the maintenance of such fundamental rights.[109]

Other language hints that illegally obtained evidence should also be rejected as a matter of judicial integrity, as courts should not give recognition to evidence obtained by unlawful acts: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[110]

The issue grew in importance as courts in later decisions wrestled with whether the exclusionary rule was applicable to state proceedings.[111] Furthermore, an explanation of the rationale employed by the Court for the exclusion in criminal cases of unlawfully obtained evidence would also have been instructive as to the application of the doctrine to civil cases. If the exclusionary rule is based upon constitutional mandate emanating from the Fourth Amendment, there can obviously be no application to the private actors in civil litigation. However, if exclusion is based upon the supervisory powers of the Court or a concern for the integrity of the judicial process, the question of applicability to civil actions then becomes more pertinent because the ramifications are comparable.

Though the developing criminal case law firmly ensconced the exclusionary rule within the Fourth Amendment, at least for the time being,[112] the source of legal authority and the policy reasons for exclusion have often been unclear and perhaps malleable, depending upon the exigencies of the case at hand. *Boyd*, involving the

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109. Weeks v. United States, 232 U.S. 383, 392 (1914).

110. *Id.* at 394.

111. *See infra* notes 117-28 and accompanying text.

112. The exclusionary rule has not gone long without its critics. *See, e.g.*, People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (refusing to recognize the applicability of exclusionary rule to the states and criticizing it generally, stating that criminals should not go free "because the constable has blundered"); Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) (criticizing the exclusionary rule and calling either for discarding it or for a substitute rule); 8 WIGMORE, *supra* note 2, §§ 2183-2184, at 6-53 (discussing and criticizing the development of the exclusionary rule).

The last twenty years have seen a considerable scaling back of its application, most noticeably in *United States v. Leon*, 468 U.S. 897, 904 (1984) (adopting a "good faith" exception to the exclusionary rule).

constitutionality of a compelled disclosure statute rather than an illegal search, was based upon a convergence of the Fourth and Fifth Amendments, resulting in the inadmissibility[113] of evidence procured pursuant to the unconstitutional statute. *Adams*, which used an analysis based solely on the Fourth Amendment, appeared to reject *Boyd*'s concept of the exclusion of evidence obtained in violation of constitutional protections.[114] Nevertheless, *Weeks* found the Fourth Amendment to be a basis for a rule of exclusion as the only effective means of enforcing constitutional guarantees.[115] The *Weeks* holding was also based on the rationale that courts should neither involve themselves with nor countenance unlawfully obtained evidence.[116] This rationale apparently had a legal basis separate and distinct from the Fourth Amendment: the supervisory powers over the federal courts, also referred to as a concern for judicial integrity.

The precise basis for the exclusionary rule became more important as the Court was called upon to resolve whether illegally obtained evidence should be excluded from state prosecutions. If the rule were based solely upon the Court's supervisory powers over the federal courts, there would not be justification for applying the rule to the states.[117] However, a basis rooted in the Fourth Amendment could be extended to the states through the Fourteenth Amendment. It was on the latter basis that the battle lines were drawn. In *Wolf v. Colorado*,[118] the Court held that the Fourteenth Amendment did make the Fourth Amendment protection from unreasonable search and seizure applicable to the states.[119] However, it also held that the rule of exclusion was not a component of the constitutional guarantee but rather "a matter of judicial implication."[120] Eleven years later, in *Elkins v. United States*,[121] the Court again stated that the basis for the exclusionary rule

113. *See supra* notes 92-96 and accompanying text.

114. *See supra* notes 98-101 and accompanying text.

115. Weeks v. United States, 232 U.S. 383, 393 (1914).

116. *Id.* at 398.

117. *See* Arthur G. LeFrancois, *On Exorcising the Exclusionary Demons: An Essay on Rhetoric, Principle and the Exclusionary Rule*, 53 U. CIN. L. REV. 49, 59 (1984) ("Surely, the Court's supervisory power does not extend to the imposition of evidentiary rules on the state courts.").

118. 338 U.S. 25 (1949).

119. *Id.* at 27-28.

120. *Id.* at 28.

121. 364 U.S. 206 (1960).

was rooted in "the Court's supervisory power."[122] *Elkins* addressed what had become known as the "silver platter doctrine."[123] In federal prosecutions following the *Weeks* ruling that the Fourth Amendment had no applicability to state actors, the silver platter doctrine was used to admit evidence that had been unlawfully obtained by state officials without any federal involvement. By finding the basis for the exclusionary rule to be the Court's supervisory powers, rather than the Fourth Amendment, *Elkins* was able to extend the exclusionary rule to silver platter situations. At the same time, *Elkins* further articulated that the rationale justifying exclusion was deterrence, rather than reparation.[124]

The holding in *Elkins*, based on supervisory powers, left the Court without power to apply the exclusionary rule to state prosecutions. Nevertheless, less than two years later in *Mapp v. Ohio*,[125] the Court extended the exclusionary rule to the states, finding it indeed to have a constitutional basis in the Fourth Amendment as applied to the states through the Fourteenth Amendment.[126] *Mapp* echoed the *Elkins* rationale of deterrence as the only effective means to guarantee protection against unreasonable search and seizure.[127] The Court also mentioned concerns of judicial integrity as an additional reason.[128]

VI. EXCLUDING EVIDENCE PURSUANT TO SUPERVISORY POWERS IN ORDER TO PRESERVE JUDICIAL INTEGRITY

The evolution of the legal basis of an exclusionary rule from a matter of supervisory powers to one of constitutional command was accompanied by a corresponding evolution of the underlying rationales for the rule. What began as a matter both of deterrence, as the only effective means of constitutional protection, and of the preservation of judicial integrity, soon became solely a means for deterring unlawful

122. *Id.* at 216.
123. *Id.* at 208.
124. *Id.* at 217.
125. 367 U.S. 643 (1961).
126. *Id.* at 651.
127. *Id.* at 656.
128. *Id.* at 659.

behavior.[129] This rationale shift permitted the development of exceptions to what had proven to be a very controversial doctrine.[130] If the exclusionary rule were viewed as a matter of judicial integrity, it would lead to much more of a bright-line rule commanding exclusion. An unlawful act is largely an unlawful act. If courts should not become involved with such evidence, then there is not much room for exception. However, if the purpose of the rule is deterrence, then courts can construct exceptions to the rule of exclusion in situations in which the goal of deterrence would not be forwarded by exclusion, such as an illegal search made in good faith.[131] This solution answers critics of the rule without discarding it altogether, which some critics have urged.[132] Nevertheless, the ability to exclude evidence as a matter of inherent supervisory power to oversee the administration of justice[133] was not totally discarded and has been mentioned by the Court as recently as 2000, in *Dickerson v. United States*.[134]

The use of supervisory power alone to exclude evidence was first most effectively championed by Justice Brandeis's dissent in *Olmstead v. United States*.[135] In *Olmstead*, the majority held that a suspect federal wiretap was not an unreasonable search and seizure under the Fourth Amendment, nor was it prohibited by statute.[136] Therefore, the majority allowed the illegally obtained evidence under

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129. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (stating that deterrence is the "prime purpose" of the rule "if not the sole one"); Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.").

130. *See, e.g.*, 8 WIGMORE, *supra* note 2, §§ 2183-2184, at 6-53 (criticizing greatly the exclusionary rule and the decisions leading to its development); People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (summarizing the main criticism of the rule with the oft-repeated line, the criminal shall "go free because the constable has blundered").

131. *See* United States v. Leon, 468 U.S. 897, 918 (1984) (creating an exception to the exclusionary rule for evidence obtained as a result of good faith reliance on a warrant later found to be defective).

132. *See, e.g., Stone*, 428 U.S. at 496 (Burger, C.J., concurring) (calling for discarding of the rule in entirety); *id.* at 538, 542 (White, J., dissenting) (arguing for a good faith exception to the rule).

133. *See generally* Nathan E. Ross, *The Nearly Forgotten Supervisory Power: The Wrench to Retaining the Miranda Warnings*, 66 MO. L. REV. 849, 849-66 (2001) (discussing the development and sources of authority of supervisory power to exclude evidence).

134. 530 U.S. 428, 437 (2000).

135. 277 U.S. 438 (1928).

136. *Id.* at 457-66.

the common law tradition that admissibility of evidence is not affected by its having been unlawfully obtained.[137] In a strongly worded dissent, Justice Brandeis argued that illegally obtained evidence should be excluded in order to "maintain respect for law; in order to promote confidence in the administration of justice; [and] in order to preserve the judicial process from contamination."[138] In *McNabb v. United States*,[139] the Court held that evidence obtained during interrogations occurring over a two-day period violated "'fundamental principles of liberty and justice'" and should not be allowed into evidence.[140] The holding was based not on constitutional grounds, but rather on supervisory powers.[141] Similarly, the *Elkins* Court, citing the dissent of Justice Brandeis in *Olmstead*,[142] relied upon supervisory power to exclude evidence turned over to federal agents by state officers who obtained it unlawfully, thereby overruling the "silver platter" doctrine.[143]

The extent of supervisory power to exclude evidence was cast in some doubt in *United States v. Payner*.[144] The Court declined to use its supervisory power to exclude evidence unlawfully obtained from a third person not a party to the pending prosecution and therefore not within the purview of the Fourth Amendment.[145] On one hand, the opinion can be read as collapsing supervisory powers into constitutional analysis, holding that supervisory power to exclude evidence extends no further than the constitutional power.[146] On the other hand, though, the

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137. *Id.* at 467.

138. *Id.* at 484-85 (Brandeis, J., dissenting).

139. 318 U.S. 332 (1943).

140. *Id.* at 340-41 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

141. *Id.* at 341 ("Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded.").

142. Elkins v. United States, 364 U.S. 206, 222-23 (1960).

143. *Id.* at 206-08.

144. 447 U.S. 727 (1980).

145. *Id.* at 733.

146. *Id.* As the *Payner* Court noted:

> The District Court and the Court of Appeals believed, however, that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights. The United States contends that this approach—as applied in this case—upsets

opinion reads as if it is fact-specific[147] and as if the exercise of supervisory power to exclude evidence remains appropriate after a balancing of the harms occasioned by the unlawful activity from which the evidence was obtained and the harms of excluding relevant evidence.[148] Because the illegally obtained evidence was not obtained from the person against whom it was offered and was not objected to by the person from whom it was obtained, it does seem that the Court could balance the harms in such a case to allow the evidence without negating the existence of the supervisory power.[149] Justices Marshall, Brennan, and Blackmun dissented, arguing that the integrity of the judicial system is at risk when illegal activities are ratified through the admission of resultant evidence.[150]

VII. BALANCING EXCLUSION AGAINST THE SEARCH FOR THE TRUTH

From its inception to the present day, the exclusionary rule has always had its critics.[151] As perhaps most famously stated by Judge Cardozo, the criticism centers around the compromise of the search for

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> the careful balance of interests embodied in the Fourth Amendment decisions of this Court. In the Government's view, such an extension of the supervisory power would enable federal courts to exercise a standardless discretion in their application of the exclusionary rule to enforce the Fourth Amendment. We agree with the Government.

Id.

147. *Id.* (using the limiting language "as applied in this case").

148. *Payner*, 447 U.S. at 734 ("But our cases also show that these unexceptional principles [deterring deliberate and unlawful intrusions into privacy] do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.").

149. *Id.* at 735 ("We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.").

150. *Id.* at 746 (Marshall, J., dissenting) ("If the federal court permits such evidence, the intended product of deliberately illegal Government action, to be used to obtain a conviction, it places its imprimatur upon such lawlessness and thereby taints its own integrity.").

151. *See, e.g.*, 8 WIGMORE, *supra* note 2, §§ 2183-2184, at 6-53; 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (3d ed. 1996) (discussing and citing criticism as well as support for the exclusionary rule).

the truth by the exclusion of evidence: "The criminal [will] go free because the constable has blundered."[152] Numerous Justices have called for its demise or modification.[153] Because the exclusionary rule evolved into solely a matter of deterrence of government conduct prohibited by the Fourth Amendment, exclusion of evidence is necessary not as a punishment in a specific case, but as the only effective deterrent against improper government action. This evolution makes the rule subject to exceptions when the goal of deterrence would not be served by exclusion, thereby answering critics who have decried the rule as compromising the search for the truth. Two such exceptions are most deserving of note. The "good faith" exception reasons that the goals of deterrence are not served when the actors involved believed they were acting within the law.[154] Therefore, the reasoning continues, the compromise to the search for the truth cannot be countenanced when the goal of deterrence is not served.[155] Operating on the other side of the balance is an exclusion for illegally seized evidence offered to impeach the testimony of the defendant.[156] Whatever price is exacted from the search for the truth by the exclusionary rule is considered too great when a defendant takes the stand and lies. Although evidence has been obtained illegally, it is allowed to impeach an untruth.[157] Both exceptions attempt to strike a balance, albeit an imperfect one, between deterring the unlawful seizure of evidence and allowing evidence in

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152. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

153. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) (arguing for discarding the exclusionary rule in the present case as opposed to awaiting a preferred substitute doctrine).

154. *See* United States v. Leon, 468 U.S. 897, 918-19 (1984) (allowing the admission of evidence, although illegally obtained, when the officer involved acted in good faith reliance on an invalid warrant).

155. *Id.* at 907 (discussing that without deterrence there is nothing to offset "the substantial social costs exacted by the exclusionary rule").

156. *See* Walder v. United States, 347 U.S. 62, 65-66 (1954) (holding that illegally obtained heroin was admissible for the sole purpose of impeaching the defendant's testimony that he did not purchase or possess narcotics); United States v. Havens, 446 U.S. 620, 627-28 (1980) ("[A] defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible . . . .").

157. *See Walder*, 347 U.S. at 65 ("[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility [because evidence was unlawfully obtained].").

order to further the search for the truth. No similar attempt has been made in civil cases. The common law tradition of admission without regard to the source has prevailed. As this Article discusses, the availability of broad discovery shifts the balance so that the price exacted from the search for the truth is not nearly as great.

VIII. THE USE OF SUPERVISORY POWER TO PRESERVE JUDICIAL INTEGRITY IN CIVIL CASES

There is a point to all of the discussion of the Court's opinions, other than just that the Supreme Court has issued some confusing rulings that make the basis for the exclusionary rule an evolving expediency. The opinions show a recognized concern for a compromise to judicial integrity when a court admits evidence that has been obtained by means of an illegal act. That concern should be given equal weight in civil as well as criminal matters, for the countenance of an illegal act is the countenance of an illegal act no matter whether in a criminal or civil proceeding. Admittedly, the absence of governmental involvement in the illegal act distinguishes the civil and criminal situations. Society is perhaps less likely to countenance illegal actions by governmental actors. However, society most likely also does not want private parties to benefit from their unlawful acts, and there is a cost to judicial integrity when courts allow that to happen. Therefore, it is my contention that the availability of civil discovery diminishes the need for illegal evidence as an aid in truth-seeking to the point where the cost to judicial integrity is not justified. Consequently, the supervisory power should be exercised to exclude illegal evidence in civil cases. Although the Court has exercised its supervisory powers with much greater frequency in criminal matters, it has also done so in comparable civil cases to reform procedures in the federal courts.[158]

158. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1449 (1984) ("Although supervisory power has been used much more frequently in criminal cases, the Supreme Court has occasionally employed supervisory power for similar purposes in civil cases."); David E. Melson, *Fourteenth Amendment—Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings*, 73 J. CRIM. L. & CRIMINOLOGY 1572, 1576 (1982) ("In McNabb, the Court reversed a murder conviction on the basis of its 'supervisory authority over the administration of criminal justice in the federal courts.' In the forty years since that decision, the Court has

IX. EXCLUDING EXCLUSION FROM CIVIL ACTIONS

"[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[159]

In the United States, when the development of the exclusionary rule reached the decision in *Mapp v. Ohio*,[160] a few courts hearing divorce cases in the mid-1960s applied its holding to exclude illegally obtained evidence in civil actions. As a result, evidence was not allowed as proof of adultery in a divorce action because it had been stolen by a spouse, apparently upon the advice of counsel, from the car of the other spouse;[161] because it had been obtained by a spouse and accompanying private investigators from a raid upon the apartment of a paramour of the other spouse;[162] or because it was procured by a spouse during a forced entry into the separately maintained apartment of the other spouse.[163] These cases were either reversed on appeal for improperly relying on *Mapp* or simply not followed by later decisions.[164] The result was the general continuation of the traditional doctrine of acceptance of illegally obtained evidence in civil cases.[165]

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exercised its supervisory power in both civil and criminal cases and has brought about significant reforms in federal lower court procedure.") (footnote omitted).

159. United States v. Nixon, 418 U.S. 683, 710 (1974).

160. *See supra* note 125 and accompanying text.

161. *See* Williams v. Williams, 8 Ohio Misc. 156, 163 (Ohio Ct. Com. Pl. 1966) (citing *Mapp* and refusing to consider letters apparently written by the wife to a former fiancé that were taken from her car by her husband during divorce proceedings and apparently upon the advice of his attorney).

162. *See* Del Presto v. Del Presto, 223 A.2d 217, 217-18 (N.J. Super. Ct. Ch. Div. 1966) (following *Mapp* in excluding evidence obtained from a raid by the wife, her son, police, and private investigators upon the apartment of the husband's lover during which photographs were taken and visual observations were made).

163. *See* Sackler v. Sackler, 224 N.Y.S.2d 790, 795-96 (Sup. Ct. 1962) (relying upon *Mapp* to exclude evidence, including photograph obtained by the husband's forceful entry and raid of his wife's separate apartment in order to obtain evidence of her adultery), *rev'd*, 229 N.Y.S.2d 61 (App. Div. 1962), *aff'd*, 203 N.E.2d 481 (N.Y. 1964).

164. *See Sackler*, 229 N.Y.S.2d at 65 (reversing lower court's suppression of evidence).

165. *See, e.g.*, State *ex rel.* State Farm Fire & Cas. Co. v. Madden, 451 S.E.2d 721, 729 (W. Va. 1994) ("[T]he exclusionary rule is not usually extended to civil

Although the *Mapp* holding and the application of the Fourth Amendment is limited to governmental actors, what was not considered was whether reasons other than the holding of *Mapp* warranted exclusion of illegally obtained evidence in civil cases. The supervisory powers basis for exclusion is not limited to governmental actors, but the fact that it was discarded as the basis for a rule of exclusion for Fourth Amendment violations[166] caused it to be forgotten as a judicial consideration when the issue of illegally obtained evidence arose in civil cases.[167] It is quite interesting that both the traditional rule of admitting evidence without regard to how it was obtained and the brief reversal of the rule originated in the context of spouses' seeking to prove adultery. One could hazard a guess that by the mid-1960s the availability of increased opportunities for civil discovery, the development of and grounds for divorce in addition to adultery, and a changed societal view of the unfaithful spouse may have caused a few courts to believe that the search for the truth no longer justified invasions of privacy and receiving evidence generated by criminal activity.

X. LIMITED LEGISLATIVE ACTION

In certain limited areas, Congress and many state legislatures have acted to exclude unlawfully obtained evidence from civil as well as criminal cases. Most notable are statutes that make it unlawful to intercept electronic communications[168] and exclude any interception

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cases."); *In re* Marriage of Cohen, 545 N.E.2d 362, 367-68 (Ill. App. Ct. 1989) (affirming the admission into evidence of psychiatric evaluations of children conducted in violation of court's previous order enjoining such); Knoll Assocs., Inc. v. Dixon, 232 F. Supp. 283, 286 (S.D.N.Y. 1964) (refusing to exclude documents stolen from corporation's files by a former employee because the lack of government involvement caused the exclusionary rule to be inapplicable).

166. *See* discussion *supra* Parts VI, VII.

167. *See, e.g.*, Charles B. Robson, Jr., Note, *Evidence—Admissibility in Civil Actions of Evidence Illegally Obtained by Private Persons*, 43 N.C. L. REV. 608, 613 (1965) (discussing *Sackler* and stating that a civil exclusionary rule would be better based upon grounds rooted in policy than in the Constitution).

168. *See* 18 U.S.C. § 2511 (2000) (making it unlawful to intercept, use, or disclose an intercepted electronic communication). For an example of a state statute, see 720 ILL. COMP. STAT. ANN. 5/14-2(a)(1) (1993) (prohibiting the recording of any conversation without the consent of all participating parties).

from introduction into evidence.[169] Such statutes certainly reflect a concern for protection of privacy, as well as for not allowing a party to benefit in litigation from an unlawful intrusion into private communications. However, it is unclear why the prohibition must be limited. Legislative history reveals no clues.[170] One could hazard a guess that because the intrusion can be accomplished without detection, the offended party may be unaware of it and is therefore in need of special protection. However, other methods of pirating evidence are equally elusive of detection, such as stealing a posted letter or photocopying a private document by stealth. There are, of course, civil and criminal remedies available for such behavior, but the evidence is not excluded.[171] It would seem that the same reasons for excluding unlawfully intercepted electronic communications would warrant excluding other forms of evidence unlawfully obtained. Nevertheless, legislatures have not chosen to act in this area. Additionally, it is not apparent why the clandestine nature of the interception should necessarily warrant special legislative treatment. Why protect secretive intrusions into privacy but not more obvious ones, such as theft of a document that would be detected? It makes one wonder whether more obvious invasions of privacy were not afforded special legislative protection because legislatures thought that their more obvious nature made them subject to exclusion from evidence.

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169. *See* 18 U.S.C. § 2515 (2000) (prohibiting the admission into evidence of unlawfully intercepted electronic communications). For an example of a state statute, see 720 ILL. COMP. STAT. ANN. 5/14-2(b) (prohibiting the use or disclosure of a recorded conversation obtained by means of unlawful eavesdropping).

For an example of the application of 720 ILL. COMP. STAT. ANN. 5/14-2(b), see *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 891-92 (N.D. Ill. 2001) (granting defendant employer's motion in limine in an employment case of alleged sexual harassment, thereby excluding a tape recording made by plaintiff of her termination interview without the consent of the participants).

170. *See* S. REP. NO. 90-1097, at 2154-58 (1968) (discussing in general terms the need to prevent unauthorized wiretapping and the use thereof as evidence).

171. *See* 8 WIGMORE, *supra* note 2, § 2184a, at 48-53.

XI. DO CHANGED TIMES WARRANT A CHANGED VIEW?

"[I]t may, of course, be argued that the refusal to permit the reception of evidence of adultery gathered through an unlawful search promotes immorality and the negation of the marriage vows. That argument, however, is untenable, since adultery may be proved by other means within the law."[172]

Illegally obtained evidence has been admitted under the notion that the search for the truth trumps other concerns. The question of whether a party may have engaged in illegality to get evidence is of no matter. The primary concern is whether the evidence advances the case toward the truth. Exclusion has only been sanctioned where necessary to further a constitutional mandate. Nonetheless, should the courts allow illegally obtained evidence in situations in which it is not necessary to aid the search for the truth? In other words, what if the evidence could have been readily obtained through lawful means? The breadth of the scope of discovery in civil actions presents that exact question.

Parties may obtain discovery of any matter that is not privileged and that is "relevant to the claim or defense of any party."[173] Therefore, any evidence that would be sufficiently relevant to be admissible would be subject to discovery. The need to illegally obtain evidence is obviated. A party seeking to establish another spouse's adultery need

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172. Sackler v. Sackler, 229 N.Y.S.2d. 61, 70 (App. Div. 1962) (Hopkins, J., dissenting), *aff'd*, 203 N.E.2d 481 (1964).

173. FED. R. CIV. P. 26(b)(1). Federal Rule 26(b)(1) provides:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

Id.

not kick in the door of a motel room to obtain photographic proof. A truthful answer to an interrogatory or a question asked at deposition will provide the answer. Even if what became known to a party through some unlawful action is later obtained lawfully through discovery, there is significantly less taint to the integrity of a court.[174] The court has not countenanced an illegality.

Of course, people lie. It would be incredibly naïve to expect a truthful answer to every discovery request, let alone to construct a rule of evidence upon an assumption of unfailing truth on the part of parties to litigation. Consequently, an exception for the admission of illegally obtained evidence for purposes of impeachment should be recognized, as with the Fourth Amendment exclusionary rule.[175] The relative proprieties of the parties involved are thereby reordered to something that is much more acceptable to society. The proponent of evidence that he obtained by breaking the law is not rewarded for the bad act because the evidence is not admissible. At the same time, the use of the evidence for purposes of impeachment does not allow the party against whom it is offered to shamelessly lie without recourse.[176] The fundamental concept from equity of not approaching the court with unclean hands is preserved. This harkens back to the dissent of Justice Brandeis in *Olmstead*, from which was born the concept of excluding illegally obtained evidence pursuant to supervisory power.[177]

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174. *See* Standard Oil Co. v. Iowa, 408 F.2d 1171, 1177-78 (8th Cir. 1969) (affirming the trial court's order returning illegally seized evidence and at the same time allowing the obtaining of the same information through "authorized discovery" as an "independent source").

175. *See* State *ex rel.* State Farm Fire & Cas. Co. v. Madden, 451 S.E.2d 721, 729-30 (W. Va. 1994) (affirming the trial court's exclusion of evidence obtained in a civil case by an unlawful surveillance but finding it an abuse of discretion to prohibit the use of that evidence for purposes of impeachment).

176. *Id.*

177. Olmstead v. United States, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting). As Justice Brandeis stated in his dissent:

> The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties.

Id. (footnotes omitted).

The broad scope of discovery in civil matters has caused trials to no longer provide for the Perry Mason type of disclosures of determinate facts.[178] Therefore, if the search for the truth no longer requires the resort to illegally obtained evidence, two questions must then be asked. First, is there a diminution in the perception of the integrity of the court when it accepts illegally obtained evidence even though such is not needed to aid the search for the truth because it is available from another source? Second, what effect does allowing a party to benefit from an illegal act have upon the view of a trial as a mechanism of dispute resolution? In other words, is there any diminution of our satisfaction with the result if the result was based in whole or in part on an underlying illegal act?

The first question echoes the same concerns expressed by the Court in relying in part upon its supervisory powers to exclude evidence obtained in violation of constitutional mandates against unlawful search and seizure—deterring unlawful conduct and maintaining judicial integrity. The supervisory powers have been most frequently relied upon in criminal actions, but they have also been utilized in a variety of civil actions as well.[179] Though no longer viewed as a basis for the exclusionary rule, supervisory powers have been relied upon to correct matters that impact the integrity of the judicial process, such as the exclusion from jury pools of a "large class of wage earners."[180] It is interesting that in other contexts courts have not allowed parties to benefit from illegal or fraudulent acts. For example, service of process procured by fraud has been held to be void.[181] Similarly, parties should not be allowed to benefit from an illegal acquisition of evidence. Therefore, the Court should rely upon its supervisory power to exclude illegally obtained evidence from civil cases except when offered for

178. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blindman's buff [sic] and more a fair contest with the basic facts disclosed to the fullest practicable extent.").

179. *See* sources cited *supra* note 158.

180. *See* Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946) (noting that a jury selection process was improper because of "the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection").

181. *See* Voice Sys. Mktg. Co., L.P. v. Appropriate Tech. Corp., 153 F.R.D. 117, 120 (E.D. Mich. 1994) (granting motion to quash summons served "through deception and trickery"); Wyman v. Newhouse, 93 F.2d 313, 315 (2d Cir. 1937) (affirming dismissal of case where service had been obtained by fraud perpetrated upon the defendant, inducing him to enter the jurisdiction).

purposes of impeachment. By so doing, both judicial integrity and the search for the truth are preserved.

The Court's decision in *United States v. Payner* must be reconciled. The Court held that "the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court."[182] In reaching that holding, the Court reasoned that the "costly toll upon the ability of courts to ascertain the truth" caused by the exclusion of competent, but illegally obtained, evidence must be weighed against the principles obtained by its exclusion.[183] What must be considered in effectuating that balance in a civil case is that the availability of discovery diminishes any harm to the search for the truth. The information can be sought through discovery. If the party lies or hides the answer, the door is then opened to impeach with the otherwise inadmissible evidence. If the evasion of a truthful answer is sufficiently egregious, the offending party is subject to sanction, including being defaulted in the action.[184] Either in addition or as an alternative to that sanction, the party could be requested to admit the fact in question pursuant to Federal Rule of Civil Procedure 36, and if after refusal the fact is established at trial, the party could be assessed the costs of making that proof.[185] Consequently, the effect upon the search for the truth is much less affected by the exclusion of illegally obtained evidence in civil cases, and the balance suggested by *Payner* between harm to truth-seeking and other values weighs in favor of exclusion.

One of the main rationales given for the exclusion from evidence of things obtained by illegal governmental action is that the remedies available to the wronged person are not sufficient to render the person whole. Therefore, exclusion of the illegal evidence is warranted in criminal actions. However, in civil actions the notion of a remedy short of exclusion prevails.[186] A closer examination reveals,

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182. United States v. Payner, 447 U.S. 727, 735 (1980).

183. *Id.* at 734.

184. *See* FED. R. CIV. P. 37 (providing sanctions for failing to answer a question propounded in discovery, or for providing evasive or incomplete answers, or for failure to disclose information either required as an initial disclosure or a supplementation thereto, or in response to a request to admit).

185. FED. R. CIV. P. 37(c)(2).

186. *See, e.g.*, Adams v. New York, 192 U.S. 585, 596 (1904) ("'A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent

however, that the available remedies are not adequate.[187] It would seem highly unlikely that criminal charges would be filed in at least two, if not all three, of the contexts for discussion. The landlord who has let himself into the apartment in violation of the lease has committed a trespass, but that trespass is upon property the landlord owns and most likely entered by using a master key so that no physical damage resulted. The same would be true for the stolen piece of paper that establishes a pattern of employment discrimination or toxic polluting. Perhaps a criminal charge might result from entering the hotel room to catch the adulterous spouse in the act, but that would seem dependent upon whether physical damage to property resulted and who would be the complainant. If the unlawful entry took place in a motel, the offended adulterer would not be the one who could most likely seek to have charges pressed. However, criminal redress does not seem available.

As for civil remedies, it is extremely difficult to measure damages resulting from a peaceful unauthorized entry into an apartment, from the theft of a piece of a paper, or from being photographed while engaged in adultery. The adultery situation presents a more compelling claim for invasion of privacy than does the landlord-tenant situation, but the plaintiff in both is a person who has committed a wrong and is trying to sue because he or she was caught. These are certainly not the most compelling facts upon which to recover. Damages could be measured by the value of the actual damage, if any, but that results in unsatisfying anomalies such as trying to ascertain the value of a piece of paper in the discriminating employer situation.[188] Finally, should there be a concept of being damaged by losing a lawsuit as a result of evidence obtained illegally?[189] This is

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articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent.'") (quoting Commonwealth v. Tibbetts, 32 N.E. 910, 911 (Mass. 1893)).

187. *See* Wolf v. Colorado, 338 U.S. 25, 41-47 (1948) (Murphy, J., dissenting) (arguing in favor of the criminal law exclusionary rule because, in part, other available remedies for the wrong by which the evidence was obtained are "illusory").

188. *See* State Forester v. Umpqua River Navigation Co., 478 P.2d 631, 637 (Or. 1970) (stating that, in deciding not to exclude evidence in the form of an arguably unlawful inspection and tests of certain equipment, "[i]t could be argued that under the traditional rules of damages, the award would be so trivial that pursuing a civil remedy might not be worthwhile").

189. *See* Note, Mapp v. Ohio *and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 YALE L.J. 1062, 1075 (1963) ("[I]t is difficult to characterize possible victory or defeat in a lawsuit resulting from the unlawfully obtained evidence

especially the case when the evidence serves to reveal the truth of that suit. Punitive damages would seem to remain equally elusive. The evidence gatherer has engaged in a willful act, but punitive damages are imposed to serve as punishment. Therefore, it is difficult to punish a person for a willful act that resulted in the gathering of evidence that exposed another wrong.[190]

Whether or not other available remedies are adequate to compensate the party from whom evidence has been unlawfully obtained, it is my thesis that there is a harm to the judicial system when a party gains an advantage in a civil suit, including one that advances the truth, as a result of an act that was unlawful in regard to the person against whom it is offered. This is especially the situation when the evidence could have been obtained through available discovery mechanisms. There is a harm to the system of justice that was previously recognized during the early development of the Fourth Amendment's exclusionary rule, but that has slipped into the judicial ether. When that harm is unnecessary as an aid to the truth, there is no reason for it to be countenanced.

Courts declining to exclude illegally obtained evidence have also cited a desire to not encourage collateral litigation.[191] That concern does not seem justified for several reasons. First, when courts admit illegally obtained evidence while stating that other remedies are available to the aggrieved party, they are encouraging other litigation. The wronged party in most actions would seem to be able to counterclaim for the trespass occasioned by the actions by which the evidence was obtained. It is also not convincing that a determination to exclude illegally obtained evidence would be any more cumbersome that any other evidentiary determination. Congress and federal courts have addressed the procedures for such determination in the context of

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as the injury suffered by the victim of the illegal search.").

190. *See Wolf*, 338 U.S. at 43-44 (Murphy, J., dissenting) (arguing that exclusion is the only effective remedy for a person from whom evidence has been unlawfully obtained). As the *Wolf* Court stated, "If the evidence seized was actually used at a trial, that fact has been held a complete justification of the search, and a defense against the trespass action." *Id.*

191. *See* 8 WIGMORE, *supra* note 2, § 2183, at 6-7 (discussing that judges should not attempt to investigate and punish "incidental offenses" during the course of a specific litigation and that, therefore, illegally obtained evidence should be admitted without inquiry into its source).

excluding unlawfully intercepted electronic evidence.[192] The clandestine nature of electronic surveillance presents a particular challenge that 18 U.S.C. § 3504(a)(1) addresses by a burden-shifting mechanism that allows the aggrieved party to raise the claim of unlawful action in obtaining the evidence that then requires the opponent to "affirm or deny the occurrence of the unlawful act."[193] In situations that do not involve such clandestine actions, such as theft of a document that could not otherwise have come into the possession of the proponent or kicking down the door of a motel room to take photographs of adulterous activities, the overt nature of the unlawful act removes concerns for burdensome collateral litigation. Therefore, this concern does not warrant the admission of the evidence in the face of

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192. 18 U.S.C. § 3504 (2000). Section 3504, regarding "[l]itigation concerning sources of evidence," provides:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
>
> (2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and
>
> (3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.
>
> (b) As used in this section "unlawful act" means any act [involving] the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

Id.

193. *See* Margaret V. Sachs, Comment, *Claiming Illegal Electronic Surveillance: An Examination of 18 U.S.C. § 3504(a)(1)*, 11 HARV. C.R.-C.L. L. REV. 632, 633 (1976) (discussing the statute generally, as well as issues presented by the burden shifting mechanism).

the reasons for its exclusion.

XII. CONCLUSION

The traditional rule of admitting evidence without regard to whether it was obtained by unlawful means is rooted in the notion that the aid of the evidence to the search for the truth trumps countervailing concerns for invasion of privacy and judicial integrity. However, with the broad scope of discovery in civil cases, the search for the truth is not as impeded presently as it previously would have been by the exclusion of illegally obtained evidence. Therefore, the traditional rule deserves reconsideration, and illegally obtained evidence should not be admitted as it exacts a cost to judicial integrity.